Nirmala a/p Ramasamy v Baramaguru a/l Mariappen

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(W)-78–01 OF 2024
AZIZAH NAWAWI CJ (SABAH DAN SARAWAK), AZIMAH OMAR AND AHMAD KAMAL JJCA
6 AUGUST 2025

Family Law — Divorce — Petition — Appeal against judicial commissioner's decision in relation to custody of children, rate of maintenance, and division of matrimonial assets — Whether judicial commissioner failed to consider wishes of children when giving respondent-husband overnight access to children — Whether judicial commissioner erred in deciding rate of maintenance — Whether judicial commissioner erred in failing to consider appellant-wife's non-monetary contribution in matrimonial assets — Whether judicial commissioner erred in relying on outdated law regarding 'joint effort' in acquiring matrimonial assets — Law Reform (Marriage and Divorce) Act 1976 — Law Reform (Marriage and Divorce) (Amendment) Act 2017

This was an appeal by the appellant-wife against the learned judicial commissioner's ('the JC') order in relation to the custody of children, rate of maintenance, and the division of matrimonial assets in a divorce petition filed by the respondent-husband. In this regard, the JC had given sole guardianship of the three children to the appellant and the respondent was given overnight access to the children. With respect to maintenance of the children, the JC had ordered the respondent to pay maintenance of RM600 per child as well as the education costs, fees for additional activities until the children completed their first degree, insurance and medical. The respondent was also ordered to pay monthly maintenance of RM800 to the appellant. As for division of matrimonial properties, the JC had decided that 15 assets ('the said 15 assets') (including 11 assets that were transferred by the respondent to his mother immediately before the filing of the petition ('the dissipated assets')) were matrimonial assets (which may be divided) but the JC had refused to order any extent of division over the said assets without properly appreciating and factoring the appellant's non-monetary contribution into home making which allowed the respondent to conduct his business. The issues that arose in the present appeal were regarding the appropriate rate of monthly maintenance for the three children and the appellant, the division of the matrimonial assets, and the custody of the children. With regard to custody, the appellant contended that the JC had not considered the wishes of the children.

Held, allowing the appeal in part (on the rate of maintenance and the division of matrimonial assets), maintaining the JC's decision as to custody and

guardianship over the three children, and ordering costs of RM20,000 to be paid by the respondent to the appellant, subject to allocatur:

(1) In assessing the appropriate rate and amount of maintenance for the children and the wife, the following rules were relevant: (a) maintenance went beyond mere basic sustenance such as food or shelter and maintenance encompassed the means, standards, and lifestyle that the children and wife were accustomed to during the subsistence of the marriage; (b) maintenance shall be assessed as against and in consideration of the husband's financial means and/or earning; (c) it was of paramount pertinence that the husband must honestly and frankly disclose his true assets, financial means, income, and earnings to the court; and (d) the fact that the wife was gainfully employed was relevant for assessment but shall not entirely disentitle the wife off of maintenance (see para 25).

(2) The court found that the JC's appraisal and assessment of the appropriate rate of maintenance for both the children and the appellant on the basis of the respondent's salary vouchers was entirely wrong and misconceived. It was grossly apparent that the family had lived a life far more lavish than a mere maintenance of RM2,600 liquid cash a month and that respondent obviously could afford more than a mere RM2,600 a month of maintenance for the three children and the appellant. The court found that the appropriate rate of monthly maintenance for the three children should be RM1,000 per child per month (RM3000 per month total) which remained apart from other costs for medical, insurance, and education that respondent was already ordered to bear by the JC. In respect of maintenance for the appellant, the appropriate rate of monthly maintenance should be RM3,000 per month (see paras 32–33).

(3) It was glaring to the court that the dissipated assets were matrimonial assets (and not business assets) that were hastily transferred to the respondent's mother for free in order to avoid any subdivision by the court. If the respondent was genuine in contending that the properties were enterprise properties, then the respondent would not have rushed to transfer the properties to the respondent's mother. Such hastiness to transfer all these properties instead was indicative of the respondent's insecurity and fear that his personal landholdings were at risk to be divided due to the divorce (see paras 38–39).

(4) The JC should have addressed the true extent of zeal and measure in which the appellant had to undertake as the sole home maker in administering the care of the children and the household. This element of non-monetary contribution was entirely absent in the JC's grounds of judgment. Further, the JC had wrongfully referred to and relied upon an outdated statute (being the old version of the Law Reform (Marriage and Divorce) Act 1976 sans the amendments *gazetted* under the Law Reform

(Marriage and Divorce) (Amendment) Act 2017. A plain and uncomplicated appreciation of the Law Reform (Marriage and Divorce) (Amendment) Act 2017 would glaringly reveal that the current law had already done away from putting emphasis on whether or not a matrimonial asset was solely or jointly acquired by the spouse(s) (see paras 40 & 42–43).

(5) The entirety of the JC's discourse premised on the factor of 'joint effort' of the outdated regime was plainly misconceived and improper. Compounding this grievous error in legal analysis, was the fact that the JC had altogether ignored the new regime's consideration as to non-monetary contributions by a homemaker and the inclination towards equality of division. It was patently wrong for the JC to dismiss the appellant's cross petition (and to deny the appellant's percentage over the said 15 assets) on the simplistic identification that the said 15 assets were solely acquired by the respondent utilising his earnings from his businesses. Therefore, upon considering the fact that the appellant was the primary or even sole homemaker in this family, (and considering the appellant had already been granted 100% entitlement and ownership of the matrimonial home and shop lot 406) the court found that the appellant was entitled to 30% entitlement or ownership of all of the said 15 assets (see paras 46–48).

(6) With regard to the custody of the children, the appellant had not referred to any specific excerpt of any interviews in which reflected any of the three children's wishes. Instead, the appellant only highlighted the JC's ratio decidendi (albeit selectively) whereby the JC had identified that (via interviews with the children) that their relationship with their father (the respondent) had somewhat deteriorated ('renggang'). However, a full reading of that paragraph of the grounds of judgment would reveal that the JC was not insinuating that it was the children's wishes to be kept away from the respondent. Instead, the JC concluded that it was undesirable to deprive the children and the respondent from the opportunity to mend their relationship if the respondent was only granted a mere two hours' daytime access to the children. Thus, there was no evidence to support the appellant's contention that the JC had meted the High Court's decision without due consideration of the children's welfare or wishes (see paras 49–51).

[Bahasa Malaysia summary

Ini merupakan rayuan oleh perayu-isteri terhadap perintah pesuruhjaya kehakiman yang bijaksana ('PK') berhubung dengan hak jagaan anak-anak, kadar nafkah, dan pembahagian aset-aset perkahwinan dalam petisyen perceraian yang difailkan oleh responden-suami. Dalam hal ini, PK telah memberikan hak penjagaan tunggal ke atas tiga orang anak kepada perayu dan responden diberi akses semalaman kepada anak-anak tersebut. Berkenaan

dengan nafkah anak-anak, PK telah memerintahkan responden untuk membayar nafkah sebanyak RM600 setiap anak serta kos pendidikan, yuran untuk aktiviti tambahan sehingga anak-anak tersebut menamatkan ijazah pertama, insurans dan perubatan mereka. Responden juga diperintahkan untuk membayar nafkah bulanan sebanyak RM800 kepada perayu. Bagi pembahagian harta sepencarian, PK telah memutuskan bahawa 15 aset ('15 aset tersebut') (termasuk 11 aset yang dipindahkan oleh responden kepada ibunya sejurus sebelum pemfailan petisyen ('aset yang dilesapkan tersebut')) adalah aset sepencarian (yang boleh dibahagikan) tetapi PK enggan memerintahkan apa-apa tahap pembahagian ke atas aset tersebut tanpa menilai dan mengambil kira sumbangan bukan kewangan perayu dengan sewajarnya ke dalam urusan rumah tangga yang membolehkan responden menjalankan perniagaannya. Isu-isu yang timbul dalam rayuan semasa adalah mengenai kadar nafkah bulanan yang sesuai untuk ketiga-tiga anak tersebut dan perayu, pembahagian aset sepencarian, dan hak jagaan anak-anak. Berkenaan dengan hak jagaan, perayu berhujah bahawa PK gagal mempertimbangkan kehendak anak-anak.

Diputuskan, membenarkan sebahagian rayuan (mengenai kadar nafkah dan pembahagian aset sepencarian), mengekalkan keputusan PK mengenai hak jagaan dan penjagaan ke atas tiga orang anak tersebut, dan memerintahkan kos sebanyak RM20,000 dibayar oleh responden kepada perayu, tertakluk kepada alokatur:

(1) Dalam menilai kadar dan jumlah nafkah yang sesuai untuk anak-anak dan isteri, peraturan-peraturan berikut adalah relevan: (a) nafkah melangkaui sekadar nafkah asas seperti makanan atau tempat tinggal dan nafkah merangkumi kemampuan, standard, dan gaya hidup yang biasa dilalui oleh anak-anak dan isteri semasa perkahwinan; (b) nafkah hendaklah dinilai berdasarkan dan dengan mempertimbangkan kemampuan kewangan dan/atau pendapatan suami; (c) adalah sangat penting bahawa suami harus secara jujur dan terus terang mendedahkan aset, kemampuan kewangan, pendapatan, dan perolehannya yang sebenar kepada mahkamah; dan (d) hakikat bahawa isteri bekerja dengan pendapatan yang lumayan adalah relevan dalam taksiran tetapi tidak akan sepenuhnya menafikan hak isteri daripada menerima nafkah (lihat perenggan 25).

(2) Mahkamah mendapati bahawa penilaian dan pentaksiran PK terhadap kadar nafkah yang sesuai untuk kedua-dua anak dan perayu berdasarkan baucar gaji responden adalah salah sama sekali dan salah tanggapan. Adalah sangat jelas bahawa keluarga tersebut telah menjalani kehidupan yang jauh lebih mewah daripada sekadar nafkah tunai yang boleh dibelanjakan sebanyak RM2,600 sebulan dan responden jelas mampu membayar lebih daripada sekadar RM2,600 sebulan nafkah untuk ketiga-tiga anak tersebut dan perayu. Mahkamah mendapati bahawa

kadar nafkah bulanan yang sesuai untuk ketiga-tiga anak tersebut hendaklah RM1,000 setiap anak sebulan (dengan jumlah keseluruhan RM3000 sebulan) yang kekal selain daripada kos lain untuk perubatan, insurans dan pendidikan yang telah diperintahkan untuk ditanggung oleh responden oleh PK. Berkenaan dengan nafkah untuk perayu, kadar nafkah bulanan yang sesuai hendaklah RM3,000 sebulan (lihat perenggan 32–33).

(3) Adalah jelas kepada mahkamah bahawa aset yang dilesapkan tersebut adalah aset perkahwinan (dan bukan aset perniagaan) yang dipindahkan secara tergesa-gesa kepada ibu responden secara percuma bagi mengelakkan apa-apa pembahagian oleh mahkamah. Jika responden benar-benar berhujah bahawa hartanah tersebut adalah hartanah milik perniagaannya, maka responden tidak akan tergesa-gesa untuk memindahkan hartanah tersebut kepada ibu responden. Ketergesa-gesaan untuk memindahkan semua hartanah ini sebaliknya menunjukkan rasa tidak selamat responden dan ketakutan bahawa pegangan tanah peribadinya berisiko untuk dibahagikan disebabkan oleh perceraian tersebut (lihat perenggan 38–39).

(4) Pesuruhjaya kehakiman sepatutnya membincangkan tahap sebenar semangat dan langkah yang perlu diambil oleh perayu sebagai satu-satunya suri rumah dalam mentadbir penjagaan anak-anak dan isi rumah. Elemen sumbangan bukan kewangan ini langsung tidak terdapat dalam alasan penghakiman PK. Tambahan pula, PK telah secara salah merujuk dan bergantung pada statut yang sudah ketinggalan zaman (iaitu versi lama Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 tanpa pindaan yang *diwartakan* di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) (Pindaan) 2017. Pemahaman yang jelas dan tidak rumit terhadap Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) (Pindaan) 2017 akan mendedahkan dengan jelas bahawa undang-undang semasa telah menghapuskan penekanan kepada isu sama ada aset perkahwinan diperoleh sepenuhnya atau bersama oleh pasangan (lihat perenggan 40 & 42–43).

(5) Keseluruhan wacana PK yang berlandaskan faktor 'usaha bersama' rejim yang ketinggalan zaman tersebut jelas disalahertikan dan tidak wajar. Memburukkan lagi kesilapan besar dalam analisis undang-undang ini ialah hakikat bahawa PK telah mengabaikan sama sekali pertimbangan rejim baharu mengenai sumbangan bukan kewangan oleh suri rumah dan kecenderungan ke arah kesaksamaan pembahagian. Adalah salah bagi PK untuk menolak petisyen balas perayu (dan menafikan peratusan milikan perayu ke atas 15 aset tersebut) berdasarkan pengenalpastian yang dangkal bahawa 15 aset tersebut diperoleh sepenuhnya oleh responden menggunakan pendapatannya daripada perniagaannya. Oleh

itu, setelah mempertimbangkan fakta bahawa perayu adalah suri rumah utama atau tunggal dalam keluarga ini, (dan memandangkan perayu telah diberikan hak dan pemilikan 100% ke atas rumah perkahwinan dan Lot Kedai 406), mahkamah mendapati bahawa perayu berhak mendapat 30% hak atau pemilikan ke atas semua 15 aset tersebut (lihat perenggan 46–48).

(6) Berkenaan dengan hak jagaan anak-anak, perayu tidak merujuk kepada apa-apa petikan khusus daripada mana-mana temu bual yang mencerminkan apa-apa kehendak tiga orang anak tersebut. Sebaliknya, perayu hanya menekankan ratio decidendi PK (walaupun secara selektif) di mana PK telah mengenal pasti bahawa (melalui temu bual dengan anak-anak tersebut) bahawa hubungan mereka dengan bapa mereka (responden) telah menjadi agak 'renggang'. Walau bagaimanapun, bacaan penuh perenggan alasan penghakiman tersebut akan mendedahkan bahawa PK tidak menggambarkan bahawa adalah kehendak anak-anak tersebut untuk dijauhkan daripada responden. Sebaliknya, PK membuat kesimpulan bahawa jika responden hanya diberikan akses siang hari selama dua jam kepada anak-anak tersebut, ini akan menghalang anak-anak tersebut dan responden daripada peluang untuk memperbaiki hubungan mereka dan ini tidak diingini oleh mahkamah. Oleh itu, tiada keterangan untuk menyokong hujah perayu bahawa PK telah membuat keputusan tanpa pertimbangan sewajarnya terhadap kebajikan atau kehendak anak-anak tersebut (lihat perenggan 49–51).]

Cases referred to

Annathurai a/l Venkidasalam v Vani a/p Welluven [2023] MLJU 2442, CA (refd)

Chaw Anui v Tan Kim Chai [2004] 4 MLJ 272; [2004] 1 LNS 260, HC (refd)

Lau Hui Sing v Wong Chuo Yong (f) [2008] 5 MLJ 846, HC (refd)

Lim Choon Seng v Lim Poh Kwee [2020] 5 MLJ 587, FC (refd)

Ng Say Chuan (h) v Lim Szu Ling (w) and another application [2010] 4 MLJ 796, HC (refd)

Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2006] 3 MLJ 184, HC (refd)

Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461, FC (refd)

Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt [1998] 1 MLJ 359; [1998] 1 CLJ 358, HC (refd)

YCC @ JCC v LSY [2006] 7 MLJ 137, HC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 76

Law Reform (Marriage and Divorce) (Amendment) Act 2017

Bowaneswari a/p Kataraya) (with Nurshakila bt Abu Hasan) (Sahar, Bowanes & Partners) for the appellant.
N Saraswathy Devi (Sharon-Shakila Gabriel) for the respondent.

Azimah Omar JCA:

A. BACKGROUND FACTS

[1] The appeal before us is an appeal against the learned judicial commissioner's ('learned JC') decision in allowing the respondent-husband's ('RH') divorce petition while also dismissing the appellant-wife's ('AW') cross-petition, particularly against the terms on custody of their three children, rate of maintenance for their three children, rate of maintenance for AW, as well as the division of matrimonial assets.

[2] As far as this appeal is concerned, the learned JC in the High Court's grounds of judgment had not delved into the underlying reasons as to the breakdown of the marriage. This is especially understandable considering AW had not mounted any objection against the divorce and had opted to carry on with the divorce. Thus, the learned JC's grounds of judgment was limited to address only matters as to custody, rate of maintenance, and the division of matrimonial assets.

[3] Considering this fact, the scope of the appeal before us shall also be confined to the same three matters. There is no necessity for us to set down and consider the causes of the divorce within our decision.

[4] During the hearing of this appeal, the learned counsels for both AW and RH had only proceeded to submit only regarding the distribution of the matrimonial assets specifically *in respect of the real estate properties*. Thus, the scope of our judgment shall also be confined only to the division of the real estate assets (apart from the issue of custody and rate of maintenance).

[5] The parties were married on 20 January 2007. The matrimony bore three children ages 17, 15, and eight years old. The dynamics and distinct roles between AW and RH were largely admitted in that AW was the homemaker housewife who was largely responsible and involved in raising and caring for the three children ever since their births while managing the day to day of the family home. RH was the primary breadwinner who owns and holds multiple designations and positions in at least two sole proprietorships (Com Tool Engineering, Com Tool Precision), and one incorporated company, Com Tool Precision Sdn Bhd. Amongst others, RH was a company director, business owner, operator who supposedly only earns RM6,000 in monthly salaries from only one sole proprietorship namely; Com Tool Engineering.

[6] Despite being one and the same entity with the two sole proprietorships, RH had not furnished any evidence to show the revenue generated by even one of the two sole proprietorships although insisting that many of the real estate properties personal held by RH were the sole proprietorships' assets.

[7] In our preliminary analysis, the learned JC had failed to appreciate the glaring and inexplicable 'gap' between RH's personal landholdings and the measly RM6,000 RH supposedly earned every month. In any case, it is exceedingly more probable than not that RH was grossly understating his monthly incomes and property holdings so as to yield the division of matrimonial asset in his favour. The learned JC had wrongly placed the evidential burden of proof against AW to discern between RH's personal landholding and RH's businesses' landholding. As a petitioner, it is incumbent upon RH to come before the court in the utmost honesty and prove his actual assets, instead of AW.

[8] Their marriage lasted for about 12 years before RH filed the divorce petition in 2019. During the life of the marriage, the family of five had then lived an above average and relatively luxurious lifestyle. Before delving into the issue of the division of the matrimonial assets, it is certainly fair and logical for us to objectively surmise that no typical family of ordinary or average means would be able to sustain the ownership of a plethora of real estate as well as venturing into entrepreneurial enterprises in the form of two sole proprietorships and an incorporated Sdn Bhd company. It is obvious that the markedly vast asset-holding and entrepreneurial ventures, had made it possible for the family to live a luxurious life. This was reflected from the fact that the family enjoyed membership at the renowned Nilai Springs Golf and Country Club.

[9] As far as matrimonial assets are concerned, a vast majority (if not all) of the real estates held by either RH or AW were all obtained during the subsistence of the marriage. If there should be any classification between these matrimonial assets, it was firstly, the matrimonial assets held directly by RH or AW ('RHAW assets'), and secondly, the matrimonial assets that were initially personally owned by RH which were hastily transferred to the RH's mother on the consideration of 'love and affection' circa 2016 incidentally immediately before RH filed the divorce petition ('dissipated assets'). Despite RH's insistence that these dissipated assets were all enterprise or business properties, it is immensely suspicious that RH could transfer business assets to his own mother *TOTALLY FREE* on the basis of love and affection. Any reasonable person of sound mind can objectively identify that the dissipated assets were definitely NOT business properties. Otherwise, no commercial enterprise with rudimentary business common sense would ever allow business properties to

be dealt with and transferred willy-nilly for a person's familial or personal reasons.

[10] Notwithstanding RH's clear attempt at dissipating the matrimonial assets, we are also minded that it was undisputed and even admitted by AW that AW had not financially contributed to the acquisition of all the matrimonial assets and that AW's contribution was strictly limited to non-monetary contributions in the aspect of home making, and caring for the welfare of the children, the spouse, and the family home.

[11] It was correctly identified by the learned JC that all of the assets (both RHAW and dissipated assets) were matrimonial assets that were purchased by RH's earnings from running his businesses. However, the learned JC fell into error when she had not fully and appropriately considered AW's non-monetary contributions in home making so as to enable RH to conduct his business worry-free.

[12] In the RH's petition, RH had not honestly laid down all of the relevant matrimonial assets. For assets solely held by RH, he only cited the terrace house situated at Nilai 5 ('the matrimonial home'), and a two and half storey bungalow ('Green Streets bungalow') situated at Seremban 2. RH also cited five cars that were held in RH's name.

[13] RH also cited matrimonial assets that were held under the AW's name encompassing a shop lot in Mukim Setul ('Setul shop lot'), a shop lot No 406 in Nilai 3 Industrial Zone ('shop lot 406') and an Innova car.

[14] In the AW's cross-petition, AW had shed further light into the true extent of the matrimonial assets held by either RH and even AW herself as well as the dissipated assets that were hastily transferred by RH to the RH's mother.

[15] AW also cited the matrimonial home, the Green Streets bungalow and shop lot 406. In addition, AW also cited further residential real estate inclusive of a condominium in U1, Shah Alam, Selangor Darul Ehsan ('U1 condominium'), a house at Nusaria Alam, Sendayan, Negeri Sembilan ('Nusaria house'), and apartment A-1–1 at Casa Ria Apartment, Rawang, Selangor ('Casa Ria Apartment'). AW also cited shop lot No 258, Nilai 3 Industrial Zone ('shop lot 258'), and shop lot No 325, Nilai Industrial Zone ('shop lot 325').

[16] As mentioned earlier, AW cited the dissipated assets which encompasses 11 real estate properties including Lot No 396, Nilai 3 Industrial Zone, Lot No 405, Nilai Industrial Zone Lot No 407, Nilai 3 Industrial Zone, Lot No 412, Nilai 3 Industrial Zone, Lot 1786, Ulu Sungai, Batu Talam Raub Pahang,

Lot 2080, Ulu Sungai, Batu Talam Raub Pahang, Lot 1574, Mukim Dong, Raub Pahang, Lot 1785, Ulu Sungai, Batu Talam Raub Pahang, Lot 1575, Mukim Dong, Raub Pahang, HS(M) 769, PT 200, Mukim Semantan Ulu, Raub Pahang, and Lot 0954, Mukim Dong, Raub Pahang. All 11 of which were directly transferred from RH to the RH's mother on the consideration of love and affection.

B. THE LEARNED JC'S DECISION

[17] In terms of custody of the parties' three children, the learned JC had ordered that AW attain sole guardianship over the three children (in respecting the children's personal wishes). The learned JC had appropriately dismissed the AW's plea to only allow RH daytime access to the children (without overnight access). Thus, RH was allowed overnight access to the three children at the set times and arrangements per the learned JC's order.

[18] In terms of maintenance for the three children the learned JC had ordered maintenance of RM600 per child per month (RM1,800 per month total). Apart from the monthly maintenance, the learned JC also ordered RH to bear the education costs, fees for additional activities until the children completes their first degree, insurance and medical costs for the children.

[19] In terms of maintenance for AW, the learned JC ordered RH to pay maintenance of RM800 a month to AW.

[20] In terms of the division of matrimonial assets, the learned JC ordered:

(a) that the matrimonial home be transferred from RH to AW;

(b) the Green Streets bungalow be maintained in the proprietorship of RH;

(c) that the Setul shop lot be transferred from AW to RH;

(d) that the shop lot 406 be maintained in the proprietorship of AW;

(e) that the Innova car be granted ownership to AW; and

(f) that the entirety of the AW's claim for all other alleged matrimonial assets (including the dissipated properties) be dismissed.

[21] In terms of the remainder alleged matrimonial assets, the learned judge had dismissed the RH's bid to prove that the assets were 'business assets' that were held for the benefit of the RH's supposed 'business' shared between RH, the RH's brother (one Yogalingam), and the RH's sister in law. The learned judge made a clear finding that all the other assets were the RH's own personal assets that were purchased utilising his earnings garnered from his businesses.

Thus, the assets were indeed matrimonial assets (which may be divided) and NOT business assets.

[22] Nevertheless, the learned JC had refused to order any extent of division over all the other assets without properly appreciating and factoring the AW's non-monetary contribution into home making which allowed RH to conduct his business.

C. THE APPEAL BEFORE US

[23] Apart from the AW's appeal against the learned JC's decision below, *RH HAD NOT filed his own appeal whatsoever against the learned JC's decision*. Thus, it is trite law that a failure or refusal to appeal is a clear admission to the truth and correctness of a court's decision. Thus, RH effectively had admitted, acknowledged, and acquiesced the following:

(a) admitted the truth that all the remainder assets cited by AW in her cross-petition were in indeed matrimonial assets (that could be divided);

(b) admitted the truth that the RH's personal proprietorship and landholding over the properties were his own personal assets which were purchased using his earnings;

(c) acquiesced that the matrimonial home be transferred from RH to AW; and

(d) acquiesced that the shop lot 406 be maintained in the proprietorship of AW.

(See *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461 (FC); *Lim Choon Seng v Lim Poh Kwee* [2020] 5 MLJ 587 (FC).)

[24] Thus, despite the RH's lengthy submissions, it no longer lies before RH to now contend that the learned judge was incorrect to find that the other assets were not business assets (and were instead matrimonial assets). Similarly, since RH had not appealed against the learned JC's decision, the learned JC's decision to grant the matrimonial home and shop lot 406 to AW shall remain undisturbed.

D. OUR DECISION

D(i). Appropriate rate of monthly maintenance for the three children and the AW

[25] In respect the rate of maintenance ordered by the learned JC we are of the view that the rates set by the learned JC were too low. There are many prevailing rules and considerations that would apply when assessing the

appropriate rate and amount of maintenance for the children and for the wife. Amongst many rules, the following is most relevant to the appeal before us:

(a) maintenance goes beyond mere basic sustenance such as food or shelter. Maintenance encompasses *the means, standards, and lifestyle that the children and wife were accustomed to during the subsistence of the marriage* (*Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2006] 3 MLJ 184);

(b) maintenance shall be assessed as against and in consideration of the husband's financial means and/or earning (*Chaw Anui v Tan Kim Chai* [2004] 4 MLJ 272; [2004] 1 LNS 260);

(c) since maintenance shall be assessed against the husband's financial means, it is of paramount pertinence that *the husband must honestly and frankly disclose his true assets, financial means, income, and earnings to the court*. And such concealment and unjustified non-disclosure can be deemed as an attempt to undermine the dignity of the court (see *Lau Hui Sing v Wong Chuo Yong (f)* [2008] 5 MLJ 846; *Ng Say Chuan (h) v Lim Szu Ling (w) and another application* [2010] 4 MLJ 796; *YCC @ JCC v LSY* [2006] 7 MLJ 137); and

(d) the fact that the wife is gainfully employed is relevant for assessment but shall not entirely disentitle the wife off of maintenance (*Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359; [1998] 1 CLJ 358).

[26] As we have appreciated earlier, it was irrefutable that the family lived relatively lavishly or at the very least, well above average lives. The children and AW reflected the lives of a family of above ordinary income or means. Plainly and succinctly, no Malaysian family of ordinary or most basic means would have enjoyed the luxuries of the amenities of an exclusive 'members' only' golf and country club. Such luxuries would make much sense if compared to the vast and sizeable landholding and real estate proprietorship (both residential and commercial) that were held by RH. This also equally applies as against the numerous and enduring business that RH had ran even to date.

[27] Thus, considering the above, the learned JC certainly have fallen into error when she simply accepted the RH's salary vouchers from his 'employment' at face value. The resounding fact remains that RH had not been frank and forthright in disclosing the true state of his earnings and finances. This was especially glaring considering that two out of the three businesses owned by RH were sole proprietorships. Since the business or enterprises were not separate incorporated entities than that of RH, the revenue, profits, or even losses are essentially the RH's revenue, profits, or losses. Thus, it was not at all sufficient for RH to merely exhibit his salary vouchers. It was equally incumbent upon RH to tender statements of accounts of the two enterprises.

[28] If indeed the two sole proprietorships were running at a loss or even dormant, it was well within the RH's power to simply and honestly furnish the accounts of the enterprises to prove as such. But somehow RH had inexplicably refused to do so and insisted *ad nauseam* that the 'businesses' were separate than that of his personal self. Which was entirely untrue. At this day and age, RH even has the option to opt for a far simpler and flexible LLP structure (limited liability partnership) so as to clearly distinguish and demarcate himself and his 'partners' from the businesses. Despite the availability of this avenue, RH remained insistent to maintain a sole proprietorship structure without appropriately formalising the so-called partnership he had with his brother in Dubai (of which the learned JC had dismissed the proof or existence of).

[29] The effect of which the law shall not distinguish the liabilities and earnings between RH and the two sole proprietorships no matter how strongly RH insisted on the separation of entities. Succinctly, RH had not at all been candid with the court as to his revenue and real estate holdings which was personally held and purchased by RH using his earnings from his businesses. If it weren't for the AW's cross-petition, the court would have been unjustly kept blind to the true and actual extent of the matrimonial assets that can be divided.

[30] On the same note (but on a different tangent), aside from the RH's deliberate non-disclosures, the factum that RH had purchased and currently owned more than a dozen real estate properties resoundingly painted an altogether different picture than the measly state of monthly earnings that RH contended. With AW assigned to the role as home maker, it was exceedingly illogical for RH to be able to afford all those real estate properties and lands on the measly monthly salary of RM6,000. With a household income of a mere RM6,000 a month, it was exceedingly unthinkable for RH to be able to afford more than a dozen properties (even including a bungalow house) while at the same time paying for golf and country club memberships and household expenses.

[31] The only logical explanation to the RH's gross 'overdraft' of his income would either be that AW had contributed to the purchase of the matrimonial assets or that RH was disingenuous and dishonest with the court in the disclosure of his true assets and earnings. Since the RH's central case was the former (in that AW had not made financial contributions), then the only logical truth left would be the latter — that RH was severely understating his true income, and financial means or standing.

[32] The aforementioned considered, we hereby find that the learned JC's appraisal and assessment of the appropriate rate of maintenance for both the children and AW on the basis of the RH's salary vouchers was entirely wrong

and misconceived. It was grossly apparent that the family had lived a life far more lavish than a mere maintenance of RM2,600 liquid cash a month and that RH obviously can afford more than a mere RM2,600 a month of maintenance for the three children and AW.

[33] We find that the appropriate rate of monthly maintenance for the three children should be RM1,000 per child per month (RM3000 per month total) which remains apart from other costs for medical, insurance, and education that RH was already ordered to bear by the learned JC. In respect of maintenance for AW, we find that the appropriate rate of monthly maintenance for AW should be RM3,000 per month.

D(ii). Division of matrimonial assets

[34] Upon our perusal of the grounds of judgment and the parties' respective submissions, we ascertained that the parties have used different terms and denominators to define numerous lands and properties which make up the matrimonial assets. Such incoherence unnecessarily requires us to arduously sift through and triple checking between different lists of assets so as to accurately identify the assets so as to avoid redundancy and inaccuracy. We are pressed to at least remark that the parties should strive (and could have done better) to present their case (to classify and tabulate the matrimonial assets) with clarity and consistency. We understand that divorce petitions can be highly contentious laced with a torrent of emotions. However, in this appeal before us, we found it difficult to even identify the full extent of the assets that were involved, and the relevant particulars as to the ownership of the assets. In any case, for the sake of clarity and to our best effort, the assets involved in the appeal before us are as follows:

COMMON TABLE OF MATRIMONIAL ASSETS	
MATRIMONIAL ASSETS HELD BY THE RH (four units)	
1	Matrimonial home
2	Green Streets bungalow
3	Casa Ria Apartment A-1–1
4	Shop lot 325
MATRIMONIAL ASSETS HELD BY THE AW (two units)	
5	Shop lot 406
6	Shop lot 258
DISSIPATED ASSETS TRANSFERRED TO RH'S MOTHER (11 units)	
7	Lot 396
8	Lot 405
9	Lot 407

10	Lot 412
11	Lot 1786
12	Lot 2080
13	Lot 1574
14	Lot 1785
15	Lot 1575
16	HS(M) 769
17	Lot 0954

[35] As against *the remainder two properties (being the Nusaria House and the U1 Condominium)* we are minded that RH had submitted that these two properties were not in the RH's proprietorship. Considering the AW's reply submission had not at all addressed the RH's contention, we are constrained to *exclude these two properties from the list of matrimonial assets.*

[36] With the aid of the table of matrimonial assets above, we can now finally and appropriately assess the correctness of the learned JC's division of matrimonial assets. Furthermore, as we have identified prior, our analysis of the learned JC's subdivision *shall exclude the matrimonial home and shop lot 406 (which were granted to the AW and not appealed against by the RH).*

[37] Thus, the extent and scope of our decision here shall only be limited to the following *15 matrimonial assets* ('MA on appeal'):

LIST of MA ON APPEAL	
MATRIMONIAL ASSETS HELD BY THE RH (three units)	
1	Green Streets bungalow
2	Casa Ria Apartment A-1–1
3	Shop lot 325
MATRIMONIAL ASSETS HELD BY THE AW (one units)	
4	Shop lot 258
DISSIPATED ASSETS TRANSFERRED TO RH'S MOTHER (11 units)	
5	Lot 396
6	Lot 405
7	Lot 407
8	Lot 412
9	Lot 1786
10	Lot 2080
11	Lot 1574
12	Lot 1785
13	Lot 1575

14	HS(M) 769
15	Lot 0954

[38] As against the 11 dissipated assets, it was glaring to us that the dissipated assets were matrimonial assets (and not business assets) that were hastily transferred to the RH's mother FOR FREE in order to avoid any subdivision by the court.

[39] If RH was genuine in contending that the properties were enterprise properties, then RH would not have rushed to transfer the properties to RH's mother. Such hastiness to transfer all these properties instead was indicative of the RH's insecurity and fear that his personal landholdings were at risk to be divided due to the divorce. This is infinitely more probable than not in view of these two facts:

(a) if those properties were genuinely enterprise properties, then what business did the enterprises or businesses had with the RH's mother to justify the transfer of all these lands to the RH's mother? It could not have been any actual business or transaction considering that there was literally no monetary consideration paid by the RH's mother to entitle her to the properties. The transfer instruments clearly indicated that the consideration for the transfer was LOVE AND AFFECTION (*PINDAHMILIK KASIH SAYANG SEMULAJADI DIANTARA ANAK LELAKI KEPADA IBUNYA*); and

(b) since the basis and consideration for the transfer of properties were merely LOVE AND AFFECTION, then the properties must necessarily and logically be RH's and not the enterprises'. The enterprises were not even recognised artificial entities. How can such a non-entity harbor and share love and affection with the RH's own mother?

[40] We are clearly minded that it was never the case contended by AW that she had financially contributed to the acquisition of all of the listed matrimonial assets. Thus, we find that the learned JC's lengthy discourse into the AW's qualifications and 'extent' of contribution into 'expanding' the RH's business by and large erroneous and misconceived. Instead, the learned JC should have addressed the true extent of zeal and measure in which AW had to undertake as the sole home maker in administering the care of the children and the household. This element of non-monetary contribution was entirely absent in the learned JC's grounds of judgment (aside from a passing remark that the learned JC had 'considered' the AW's non-monetary contribution).

[41] Despite ascertaining that the 15 MA on appeal were divisible, the learned JC still dismissed the entirety of the AW's cross-petition. If in fact the learned JC had considered the AW's non-monetary contribution as a sole home

maker, then clearly the learned JC should have at least ordered some percentages for AW over all of the 15 MA on appeal. Instead, the learned JC only ordered subdivision of matrimonial assets limited to the RH's petition.

[42] In fact, it was exceedingly disconcerting that neither of the parties were aware and had frankly raised in the appeal before us that *the learned JC had wrongfully referred to and relied upon an OUTDATED STATUTE (being the old version of the* Law Reform (Marriage and Divorce) Act 1976 *sans the amendments gazetted under the* Law Reform (Marriage and Divorce) (Amendment) Act 2017.

[43] It was alarming that either parties were aware (or had not frankly raised) of the fact that the learned JC in *paras 73, 89, 90, and 92 of the grounds of judgment* had erroneously relied upon the *factor of 'joint effort'* of the old regime which had already been *EXPRESSLY ABOLISHED* by the current regime of the LRA. A plain and uncomplicated appreciation of the Law Reform (Marriage and Divorce) (Amendment) Act 2017 would glaringly reveal that the current law has already done away from putting emphasis on the whether or not a matrimonial asset was solely or jointly acquired by the spouse(s):

> 6 Amendment of section 76
>
> Section 76 of the principal Act is amended
>
> (a) in subsection (1), by *deleting the words 'by their joint efforts'*;
>
> (b) in subsection (2) —
>
> (i) in paragraph (a), by inserting after the words 'the assets' the words 'or payment of expenses for the benefit of the family';
>
> (ii) by inserting after paragraph (a) the following paragraph:
>
> (aa) *the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family*;
>
> (iii) in paragraph (c), by substituting for the comma at the end of the paragraph a semicolon; and
>
> (iv) by inserting after paragraph (c) the following paragraph:
>
> '(d) the duration of the marriage,'; and
>
> (c) by deleting subsections (3) and (4).

[44] The current regime of s 76 of the LRA 1976 reads:

> *76 Power for court to order division of matrimonial assets*
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, *to order the division between the parties of any assets acquired by*

them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1) the court shall have regard to —

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;

(aa) *the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family*;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage;

(d) the duration of the marriage,

and subject to those considerations, *the court shall incline towards equality of division.*

[45] The effect of the implementation of the amendment was recently restated by the Court of Appeal in *Annathurai a/l Venkidasalam v Vani a/p Welluven* [2023] MLJU 2442:

> [17] After the amendment of the LRA, Aliza Sulaiman JC (now J) elegantly held as follows in *Poonageswari a/p P Krishnan v Bailand a/l Govindanam* [2019] MLJU 448 with emphasis added by us:
>
> > [58] A perusal of the Bill (DR 33/2017) for Act A1546 and the Hansard when the said Bill was debated in Parliament shows that a major part of the amendments was necessitated in order to address the rights of a converted spouse to initiate a divorce proceeding in the civil court and the issue of whether the converted spouse can unilaterally convert the child of the marriage to Islam. In so far as s 76 of the LRA 1976 is concerned, the objective of the amendments was to provide better security to the position of wives and to give due recognition to their contribution in kind by taking care of the home and its members, some who may even had to give up their salaried employment and whatever career advancements or opportunities they had in order to take care of the family. In other words, the sacrifices made by the fairer sex for the well-being of the family, especially the nuclear family unit, are not in vain.
> >
> > [59] *With the new s 76 of the LRA 1976, the court is empowered to have regard to the payment of expenses for the benefit of the family; the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family; and the duration of the marriage, for the purposes of equality of division of matrimonial assets*. Wives and mothers who are home makers from the inception of the marriage or who intentionally choose to become full time home managers *but were deprived of any division of the assets acquired for the welfare of the family, due to the inability to prove 'joint effort' under the previous wordings of s 76 of the LRA 1976, are thus better protected.* All assets acquired during the subsistence of marriage are now considered as matrimonial property.

> [60] At a glance, the new s 76 of the LRA 1976 would lean more favorably towards the petitioner in the present case since her contribution by looking after the home and the daily needs of the family are taken into account even though the Petitioner was not able to contribute monetarily to the acquisition of the Sentul property.

[46] Thus, the entirety of the learned JC's discourse premised on the factor of 'joint effort' of the outdated regime was plainly misconceived and improper. Compounding this grievous error in legal analysis, was the fact that the learned JC had altogether ignored the new regime's consideration as to non-monetary contributions by a homemaker and the inclination towards equality of division.

[47] Considering the above, it was clear to us that the learned JC had fallen into grave error in applying outdated laws and principles which had long been abolished. It was patently wrong for the learned JC to dismiss the AW's cross-petition (and deny AW's percentage over the 15 MA on appeal) on the simplistic identification that the 15 MA on appeal were solely acquired by RH utilising his earnings from his businesses.

[48] Therefore, upon considering the fact that AW was the primary or even sole homemaker in this family, (and considering AW had already been granted 100% entitlement and ownership of the matrimonial home and shop lot 406) we find that AW was entitled to 30% entitlement or ownership of all of the 15 MA on appeal. Despite the new regime's inclination towards 50–50 or equal division, it was still up to the court's reasonable discretion to order the appropriate percentage of division. Thus, since AW had already been granted 100% ownership of two out of the 17 real estate matrimonial assets (which was acquiesced by RH) it was only just to award 30% entitlement over the remainder 15 MA on appeal to AW. This was also for the fact that the remainder 15 MA on appeal were not the matrimonial home in which AW actively and directly worked on to make the family home.

D(iii). Custody over the three children

[49] We are minded that during the hearing of this appeal, the learned counsel for AW did not submit to the AW's contention, insisting that RH not to be allowed overnight custody over the three children. Going purely by the AW's written submission, it can only be identified that the AW's sole gripe against the learned JC's decision was that supposedly the learned JC had not considered the wishes of the children. Nonetheless, *AW had not referred to any specific excerpt of any interviews* in which reflected any of the three children's wishes.

[50] Instead, AW only highlighted the learned JC's ratio decidendi (albeit selectively) whereby the learned JC had identified that (via interviews with the children) that their relationship with their father ('RH') had somewhat deteriorated ('renggang'). However, a full reading of that paragraph of the grounds of judgment would reveal that the learned JC was not insinuating that it was the children's wishes to be kept away from RH. Instead the learned JC concluded that it was undesirable to deprive the children and RH from the opportunity to mend their relationship if RH was only granted a mere 2 hours' daytime access to the children.

[51] Thus, there is no evidence to support the AW's contention that the learned JC had meted the HC's decision without due consideration of the children's welfare or wishes.

[52] In view of all of the above deliberation we accordingly find that there are merits in the present appeal. Thus, we hereby *PARTIALLY ALLOW* the appeal before us (specifically in respect of heading D(i) on the rate of maintenance, and D(ii) on the division of the matrimonial assets limited to the 15 matrimonial assets on appeal). The learned JC's decision as to custody and guardianship over the three children is hereby maintained.

[53] For clarity's sake our order are as follows:

(a) RH to pay monthly maintenance for the three children at the rate of RM1,000 per child per month (RM3000 per month total) which remains apart from other costs for medical, insurance, and education that the RH was already ordered to bear by the learned JC;

(b) RH to pay AW a monthly maintenance for AW at the rate of RM3,000 per month;

(c) it is hereby declared that AW is entitled to 30% ownership over the 15 real estate properties as listed in the list of MA on appeal (which is inclusive of the 11 dissipated assets transferred to the RH's mother);

(d) it is hereby declared that the RH's transfer of the 11 dissipated assets to the RH's mother was an unlawful dissipation of matrimonial assets;

(e) it is hereby ordered that the 11 dissipated assets be transferred into the RH's and the AW's joint-proprietorship specifically for the purpose of onwards disposal and subdivision of the proceeds of sale between AW and RH;

(f) it is hereby ordered that the 15 properties listed in the list of MA on appeal be sold off (at the appropriate and fair value to be mutually agreed by both AW and RH) and 30% of the proceeds from the sale of the 15 properties be paid to AW;

(g) alternatively, at the sole option of AW, RH may purchase the AW's 30% entitlement from AW by paying AW the total sum value equivalent to 30% of all the 15 MA on appeal (at the appropriate and fair market value to be mutually agreed by both AW and RH); and

(h) if need be, parties are at liberty to apply at the High Court.

[54] Lastly, we also order costs of RM20,000 to be paid by RH to AW, subject to allocatur.

Appeal allowed in part (on the rate of maintenance and division of matrimonial assets); JC's decision as to custody and guardianship over three children maintained; costs of RM20,000 to be paid by respondent to appellant, subject to allocatur.

Reported by Dzulqarnain Ab Fatar